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IN THE

Supreme Court of the United States

October Term, 1969

No. 126

FRANCHISE WALL, *Appellant*,

v.

TAX COMMISSION OF THE CITY OF NEW YORK, *Appellee*.

On Appeal From the Court of Appeals of the State of New York

MOTION FOR LEAVE TO FILE A BRIEF AND BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

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1. The National Jewish Commission on Law and Public Affairs, a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish Community in matters of public concern, hereby applies for itself and on behalf of the following Na-

tional Orthodox Jewish organizations, for leave to submit the attached brief:

Agudath Harabonim,
Union of Orthodox Rabbis
Agudath Israel of America
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of Hebrew Day Schools
Union of Orthodox Jewish Congregations of America

2. Pursuant to Rule 42(3) of the Revised Rules of this Court, consent to the filing of this *amicus* brief was requested of the parties on September 16, 1969. In a letter dated September 17, appellee (per Hon. J. Lee Rankin, Corporation Counsel) consented to the filing of the brief. No response has been received from appellant.

3. Neither of the parties in this case have the direct and immediate interest in the resolution of the issue presented that is possessed by these *amici*. The organizations enumerated above on whose behalf the National Jewish Commission on Law and Public Affairs is submitting this brief represent religious corporations and associations which own property in the State of New York and elsewhere, and which will be seriously and irreparably injured if appellant's contention is sustained. It is the view of these *amici* that a denial of tax exemption to such associations on account of their religious character would be unconstitutionally discriminatory and would violate the

constitutional protection granted by the First Amendment to the exercise of religion.

4. The constitutional position urged in the attached *amicus* brief—*i.e.*, that the tax exemption for property owned by religious corporations and associations is *constitutionally mandatory*—is one which neither party before this Court can be expected to take. The attached brief sets out that position which, in the view of these *amici*, is essential to the survival of religious freedom in this country.

CONCLUSION

For the foregoing reasons, the motion for leave to file the attached brief *amicus curiae* should be granted.

Respectfully submitted,

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TAX COMMISSION OF THE CITY OF NEW YORK, *Appellee*.

BRIEF OF NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS AS AMICUS CURIAE

This brief is submitted on behalf of the National Jewish Commission on Law and Public Affairs and is joined in by the following organizations:

Agudath Harabonim,
Union of Orthodox Rabbis
Agudath Israel of America
National Council of Young Israel
Poalei Agudath Israel of America
Rabbinical Alliance of America
Rabbinical Council of America
Religious Zionists of America
Torah Umesorah, National Society of
Hebrew Day Schools
Union of Orthodox Jewish
Congregations of America

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INTEREST OF THE AMICUS CURIAE

The National Jewish Commission on Law and Public Affairs is a voluntary association organized to combat all forms of religious prejudice and discrimination and to represent the position of the Orthodox Jewish community on matters of public concern. The Commission is deeply committed to the preservation of constitutional rights of all Americans, and in particular to the principles of the First Amendment, in the belief that thereby Americans of the Jewish faith, in common with all Americans, will enjoy the blessings of liberty. The Commission firmly believes that the survival of religious institutions in the United States depends upon their being treated fairly and equally at the hands of the government. We are of the view that the Free Exercise Clause of the First Amendment was designed by the Nation's Founding Fathers to protect religion and religious institutions against invidious and unfair discrimination. Accordingly, we submit this brief to point out that the constitutional contention made by appellant would, if sustained, result in impermissible discriminations and would undermine the important freedoms secured for all citizens by the First Amendment.

QUESTION PRESENTED

Whether the Establishment Clause of the First Amendment requires the State of New York, which grants tax exemption to educational and charitable institutions, to deny such exemption to religious institutions solely because of their religious character.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Constitution of the State of New York classifies real and personal property owned by nonprofit religious associations and organizations together with similar property owned by nonprofit educational or charitable associations and organizations, and it exempts from taxation all such property. The Real Property Tax Law of the State of New York defines "nonprofit organizations" which are exempted from real property tax so as to include such property if owned by "a corporation or association organized exclusively" for religious purposes. In so doing, it classifies such religious organizations together with corporations or associations "organized exclusively" for "moral or mental improvement of men and women" and for "charitable, benevolent, . . . educational . . . scientific, literary, . . . patriotic, historical or cemetery purposes." The constitutional issue presented by this appeal is whether this classification violates the First and Fourteenth Amendments because it results in the exemption from tax of property held for religious purposes and thereby operates as a governmentally authorized financial benefit to religious institutions.

These *amici* submit that the challenged provisions are not merely permitted by the cited Amendments to the United States Constitution, but are, in fact, mandated by them. The nub of our contention is that religious corporations and associations are constitutionally entitled, by virtue of the Free Exercise Clause of the First Amendment and the Equal Protection Clause of the Fourteenth, to no less—both in the allocation of governmental burdens and in the distribution

of benefits—than other "educational or charitable" enterprises. This Court's decisions have established time and again that the Religion Clauses of the First Amendment were designed to give free exercise of religion a "preferred" place in the panoply of rights possessed by inhabitants of the United States. Rather than requiring, therefore, that New York—or any other State of the Union—single out religious activities as the only nonprofit eleemosynary efforts subject to the financial burden of a tax, the Constitution demands that they be treated by State law on at least an equal footing with other charitable enterprises.

We point out that New York has drawn no distinctions under its Constitution and statutes among various types of charitable activities. There is, therefore, no question here of peculiar or unusual advantages being given to religious organizations in contrast with charities which are not religious in nature. The only question is whether New York may classify property owned for nonprofit religious purposes with that of other charitable organizations or whether the Constitution commands that it be classified "with the wares and merchandise of hucksters and peddlers." *Murdock* v. *Pennsylvania,* 319 U.S. 105, 115 (1943). We submit that the decisions of this Court and the firmly rooted policies underlying the First Amendment entitle the religious organizations which come within these provisions of New York law to tax exemption as a matter of constitutional right.

HAVING DETERMINED TO EXEMPT PROPERTY OWNED BY CHARITABLE INSTITUTIONS FROM TAXATION, NEW YORK IS CONSTITUTIONALLY OBLIGED TO AFFORD THE SAME PRIVILEGES TO RELIGIOUS AS TO NON-RELIGIOUS ORGANIZATIONS

A. New York's Constitutional and Statutory Taxing Scheme Creates Exempt and Non-Exempt Classifications, and the Property of Charitable Organizations Is Covered by the Latter

New York's Real Property Tax Law (McKinney's Consolidated Laws, Vol. 49A) authorizes taxation of "[a]ll real property within the state" (*id.* at § 300) under the supervision of a state board of equalization and assessment (*id.* at § 202) and a division of equalization and assessment in the State's executive department (*id.* at § 201). The law provides, however, for the exemption from this tax (as well as exemption from special *ad valorem* levies and special assessments, see *id.* at § 490) of a broad range of realty publicly (*id.* at §§ 400-418) and privately (*id.* at §§ 420-489) owned. The "private property" thus exempted includes that owned by certain corporations organized for profit, including opera house corporations (§ 426), corporations operating infant homes (§ 400), agricultural societies (§ 450), and medical, pharmaceutical and dental societies (§§ 470, 472, 474). The first of the sections included in the exempt "private property" group is at issue here, and it is designed to cover "non-profit organizations" (*id.* at § 420).

The statute, as amended in 1965, exempts property:

> "owned by a corporation or association organized exclusively for the moral or mental improvement of men and women, or for religious, bible, tract, charitable, benevolent, missionary, hospital, infirmary, educational, public playground, scientific, literary, bar association, medical society, library,

> patriotic, historical or cemetery purposes, for the enforcement of laws relating to children or animals, or for two or more such purposes, and used exclusively for carrying out thereupon one or more of such purposes either by the owning corporation or association as hereinafter provided . . . ."

The statute carefully requires that the organization or association be nonprofit in nature:

> "Such real property shall not be exempt if any officer, member or employee of the owning corporation or association shall receive or may be lawfully entitled to receive any pecuniary profit from the operations thereof, except reasonable compensation for services as effecting one or more of such purposes, or as proper beneficiaries of its strictly charitable purposes; or if the organization thereof for any such avowed purposes be a guise or pretense for directly or indirectly making any other pecuniary profit for such a corporation or association or for any of its members or employees; or if it be not in good faith organized or conducted exclusively for one or more such purposes."

Appellant's constitutional claim is, essentially, that the First and Fourteenth Amendments require that religious organizations be denied the benefit of this broad tax relief, notwithstanding the fact that it is granted across-the-board to nonprofit charitable corporations and organizations. The result, if appellant's claims were sustained, would be the taxation of such property on a par with commercially held real property and that held by private individuals for personal profit or for other personal motives.

We emphasize, at this point, what the New York Constitution and statute do *not* do. They do not grant a unique or peculiar tax status to religious corpora-

tions vis-a-vis other charities which are not religious in nature. Compare Section 511(a), Internal Revenue Code of 1954. Nor do they even distinguish in degree —either by differing tax rates or by the special augmentation of generally available tax benefits—between religious and nonreligious charities. Compare Section 170(b)(1)(A), Internal Revenue Code of 1954. They simply assign property owned by religious organizations precisely the same tax status as that enjoyed by secular nonprofit "charitable and educational" institutions. We demonstrate below that the United States Constitution does not permit New York to do any less.

B. A Denial of Tax Exemption on Account of the Religious Nature of the Claimant Organization Would Violate the First and Fourteenth Amendments

We begin with the well-established premise that the First Amendment prohibits not merely a direct governmental restraint upon the exercise of the rights secured by it, but also the indirect deterrent of a tax (*Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), or of a withdrawal or denial of tax exemption (*Speiser* v. *Randall*, 357 U.S. 513 (1958)). This Court applied that principle to protect the free exercise of religion when it held that a State could not condition unemployment compensation benefits in a manner which would burden the recipient's practice of his or her religion. *Sherbert* v. *Verner*, 374 U.S. 398 (1963).

A denial of tax exemption to religious organizations in a statutory framework such as New York's would, under the above decisions, have the same constitutional consequence as a tax directed specifically and particularly at property owned by religious organizations. For apart from its religious character, the nature of a

nonprofit corporation or organization operating a synagogue, church or religious school is no different from the other nonprofit associations enumerated in Section 420 of New York's Real Property Tax Law. If tax exemptions were denied to synagogue and church property while being retained for buildings operated for "scientific, literary, bar association, library, patriotic, [and] historical" purposes or for nonreligious "charitable" and "benevolent" purposes (including those devoted to "moral or mental improvement of men and women") it would only be *because* of the religious nature of the owning organization and the religious purpose for which the building is to be used.

Such a singling out of religious activity and property necessary for the exercise of religion would, we submit, be impermissibly discriminatory under the First and Fourteenth Amendments. In *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943), and *Follett* v. *McCormick,* 321 U.S. 573 (1944), this Court struck down, as violative of the Free Exercise Clause of the First Amendment, local ordinances which required that license taxes be paid by, *inter alia,* traveling evangelists and preachers. The Court held that "a flat license tax as applied to one who earns his livelihood as an evangelist or preacher" is unconstitutional because "[t]he exaction of a tax as a condition to the exercise of the great liberties guaranteed by the First Amendment is as obnoxious . . . as the imposition of a censorship or prior restraint." 321 U.S. at 576, 577. The Court rejected the argument that the licensing ordinance was, on its face, nondiscriminatory because it applied to all commercial activity (319 U.S. at 115):

> "A license tax certainly does not acquire constitutional validity because it classifies the privileges

> protected by the First Amendment along with the wares and merchandise of hucksters and peddlers and treats them all alike. Such equality in treatment does not save the ordinance. Freedom of press, freedom of speech, freedom of religion are in a preferred position."

Even the dissenters in *Murdock* and its companion cases—who were concerned lest the majority opinion be read as totally exempting church or press from the financial burdens of government (319 U.S. at 127-128) —agreed that if the ordinances had been discriminatory—*i.e.*, if they had singled out one religious group for the payment of taxes, or, for that matter, all religious or "informatory" groups—"entirely distinct issues" would have been raised (319 U.S. at 118). Discrimination of that nature would clearly have come within the rule of *Grosjean* v. *American Press Co.*, 297 U.S. 233 (1936), where the Court struck down a State license tax directed solely at newspapers, magazines, periodicals and other publications on the ground that a statute so "single in kind" (297 U.S. at 250) would impermissibly fetter the free press guaranteed by the First Amendment.

The same result would follow if the Constitution were read, as appellant would have it, to require States and local jurisdictions to treat religious nonprofit associations—which are otherwise, by their nature, benevolent and charitable and designed to promote the "moral or mental improvement of men and women" —differently from their nonreligious counterparts. The consequence would be a tax on religion, different in neither kind nor constitutional impact from the tax on newspapers struck down in *Grosjean* or from a hypothetical "single in kind" tax on religious colpor-

teurs—which this Court would, it appears, have unanimously found unconstitutional had it been presented in any of the cases decided together with *Murdock*.

Indeed, if the New York Constitution and statute excluded religious organizations *because of their religious nature* from the benefits of the otherwise available tax exemption, that exclusion would, we submit, present serious questions under the Equal Protection Clause of the Fourteenth Amendment. For, entirely apart from the protections of the First Amendment, legislative discriminations on the basis of creed are no less invidious and impermissible than those based on race or color. *E.g., United States* v. *Seeger,* 380 U.S. 163, 188 (1965) (Douglas, J., concurring). And to grant a property-tax exemption to a secular organization which promotes the "moral improvement" of man while denying it to a theistic group would be to make precisely the discrimination prohibited by the Equal Protection Clause.

C. The "Establishment Clause" Neither Requires Nor Saves a State Statute Which Imposes a Unique Burden on Religious Organizations.

The discrimination against religious institutions which appellant is seeking in this case cannot, for the reasons given above, pass constitutional muster—unless, of course, the prohibition against establishment of religion also prescribed by the First Amendment requires or permits it. It does neither.

Here, as was true of the "extension of unemployment benefits to Sabbatarians in common with Sunday worshippers" in *Sherbert* v. *Verner,* 374 U.S. 398, 409 (1963), the granting of tax-exempt status to religious corporations in common with nonreligious charities

"reflects nothing more than the governmental obligation of neutrality in the face of religious differences." All that the State of New York has done is so to cast its constitution and statutes that "individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Nonbelievers, Presbyterians or the members of any other faith" are not disadvantaged "*because of their faith, or lack of it.*" *Everson* v. *Board of Education,* 330 U.S. 1, 16 (1947).

This case does not involve any special or unique benefit granted to religious organizations. Nor does it reflect any decision by the State to promote all religions, as contrasted with nonreligious endeavors. Under the New York statute all charities are treated alike, irrespective of religious affiliation. Unless the Establishment Clause is a directive that the practice of religion be destroyed by the imposition of unique burdens not placed on similar nonreligious activities, that constitutional provision cannot be read as sustaining appellant's position.

CONCLUSION

At issue here is the constitutionality of a tax exemption granted to religious nonprofit organizations in common with other charities. New York's authority to withhold that exemption is governed by the principle that "[i]f Government wishes to withdraw a subsidy or a privilege, it must do so by means and in terms which do not endanger First Amendment rights." *Lamont* v. *Postmaster General,* 381 U.S. 301, 310 (1965) (concurring opinion). We submit that First Amendment rights would be endangered and indeed, violated, if this tax exemption did not extend to property owned by religious associations. It follows,

a fortiori, that the decision below, sustaining the statute against constitutional challenge, should be affirmed.

Respectfully submitted,

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